

[No. 52810-6-I. Division One. January 10, 2005.]

SILVERSTREAK, INC., ET AL., *Appellants*, v. THE DEPARTMENT OF LABOR AND INDUSTRIES, *Respondent*.

- [1] **Public Contracts — Construction Contracts — Prevailing Wages — Enforcement — Administrative Notice — Judicial Review — Governing Law.** Judicial review of an administrative notice of violation of the prevailing wage statute (chapter 39.12 RCW) is governed by the Administrative Procedure Act (chapter 34.05 RCW).
- [2] **Administrative Law — Judicial Review — Appellate Review — Record — Agency Record — In General.** An appellate court reviewing an agency adjudication sits in the same position as the trial court and applies the review standards of RCW 34.05.570(3) directly to the agency record.
- [3] **Administrative Law — Judicial Review — Appellate Review — Issues of Law — Standard of Review.** When reviewing an agency adjudication, an appellate court reviews questions of law de novo but will accord substantial weight to the agency's interpretation of the statutes that it administers.
- [4] **Administrative Law — Judicial Review — Mixed Question of Law and Fact — Standard of Review.** Upon judicial review of an administrative decision involving a mixed question of law and fact, a court determines the law independently and then applies the law to the facts as found by the administrative agency.
- [5] **Public Contracts — Construction Contracts — Prevailing Wages — Intended Beneficiaries.** The intended beneficiaries of the prevailing wage statute (chapter 39.12 RCW) are workers, not government contractors or their assignees.
- [6] **Public Contracts — Construction Contracts — Prevailing Wages — Scope — Incorporation of Materials Into Project — Necessity.** Under RCW 39.12.020 and WAC 296-127-018, a worker who delivers materials to the work site of a public works project is not entitled to be paid the prevailing rate of wages unless the worker also spreads, levels, rolls, or otherwise participates in any incorporation of the materials into the project. A worker's mere delivery of materials to the site, without more, is insufficient to qualify the worker to be paid the prevailing wage rate.
- [7] **Administrative Law — Rules — Construction — Meaning of Words — Absence of Administrative Definition — Resort to Dictionary.** When a word in an administrative rule is not defined by the rule or by the statute under which the rule was adopted, a court may resort to a dictionary to determine the meaning of the word.
- [8] **Administrative Law — Rules — Construction — Unambiguous Language.** When an administrative rule is unambiguous, a

court will assume that the rule means what it says and will not construe the rule beyond the plain meaning of its words.

- [9] **Administrative Law — Rules — Construction — Meaning of Words — Ejusdem Generis.** When a general term is in sequence with specific terms in an administrative rule, the rule of ejusdem generis holds that the general term is restricted to items similar to the specific terms.
- [10] **Public Contracts — Construction Contracts — Prevailing Wages — Scope — Incorporation of Materials Into Project — "Otherwise Participate[s]" — Scope.** For purposes of WAC 296-127-018(2)(a), which provides that a worker who delivers materials to a public works project site is entitled to be paid the prevailing rate of wages if the worker also performs any "spreading, leveling, rolling, or otherwise participate[s] in any incorporation of the materials into the project," the phrase "or otherwise participate[s] in any incorporation of the materials into the project" is limited by the more specific preceding terms to activities that are similar in kind to spreading, leveling, or rolling.
- [11] **Public Contracts — Construction Contracts — Prevailing Wages — Truck Drivers — Delivery of Materials.** Under RCW 39.12.020 and WAC 296-127-018, a truck driver who delivers fill materials to the site of a public works project is not entitled to be paid the prevailing rate of wages unless the driver performs some additional task, beyond the mere delivery of the materials, that incorporates the materials into the project in a manner that is similar to rolling, leveling, or spreading. The fact that the driver delivers the materials directly to the place where it is used at the work site, rather than to a central stockpile for later movement, thereby improving construction efficiency, is not dispositive as such act does not involve an incorporation of materials into the project that is similar to "rolling, leveling, or spreading." Where the driver remains in the truck and does not in any manner control the rate at which the materials are being deposited at the site, such as by the tailgate, belly dump, spreader box, or paving machine method of delivery, no additional task is performed that would qualify the driver to be paid the prevailing rate of wages.
- [12] **Statutes — Construction — Amendment — Judicial Amendment — Guise of Construction.** A court will not rewrite a statute in the guise of construing it.
- [13] **Public Contracts — Construction Contracts — Prevailing Wages — Rules — Construction — Liberal Construction Standard — Effect.** Notwithstanding the remedial purposes of the prevailing wage statute (chapter 39.12 RCW) and the charge that it be liberally construed, the plain language of rules adopted by the Department of Labor and Industries in furtherance of the statute cannot be ignored and must be given effect.

- [14] **Appeal — Disposition of Cause — Basis for Decision — Alternative Grounds.** Once an appellate court has decided an issue on one ground, it may decline to consider any other grounds for deciding the issue.
- [15] **Administrative Law — Judicial Review — Attorney Fees — Unjustified Agency Action — Discretion of Court.** It is a matter of trial court discretion whether attorney fees should be awarded for trial litigation under the equal access to justice act (RCW 4.84.350) and, if fees are to be awarded, it is for the trial court to determine the amount of the award.
- [16] **Administrative Law — Judicial Review — Attorney Fees — Unjustified Agency Action — Statutory Provisions — “Substantially Justified” — Burden of Proof.** A court may decline to award attorney fees to a party that prevails upon judicial review of an agency action under the equal access to justice act (RCW 4.84.350) if it finds that the agency’s action was reasonable and substantially justified, even if ultimately found to be incorrect. The agency has the burden of showing that its action was justified to a degree that could satisfy a reasonable person.
- [17] **Administrative Law — Judicial Review — Attorney Fees — Unjustified Agency Action — What Constitutes — Delayed Enforcement Proceedings.** An agency’s mere delay in investigating an alleged statutory violation and in issuing notices of violation that are later overturned by a court does not necessarily constitute unjustified agency action within the meaning of the equal access to justice act (RCW 4.84.350), particularly if the delay was not prejudicial.
- [18] **Administrative Law — Judicial Review — Attorney Fees — Unjustified Agency Action — Statutory Provisions — “Substantially Justified” — What Constitutes.** An agency action is “substantially justified” within the meaning the equal access to justice act (RCW 4.84.350) if there is language in recent case law that would tend to support the action and the agency took the action under a statutory charge to enforce statutory provisions having remedial purposes.

Nature of Action: Several subcontractors hired to provide fill material at a public works construction site sought judicial review of an administrative decision that their drivers qualified to be paid the statutory prevailing wage.

Superior Court: The Superior Court for King County, No. 02-2-24541-2, Mary Yu, J., on July 17, 2003, entered a judgment upholding the administrative decision.

Court of Appeals: Holding that the drivers did not qualify to be paid the statutory prevailing wage because

their activities at the work site did not involve incorporating the delivered materials into the project in a fashion similar to spreading, leveling, or rolling, the court *reverses* the judgment, *grants* judgment in favor of the plaintiffs, and *remands* the case for further proceedings on the question of attorney fees at trial.

John P. Ahlers (of *Short, Cressman & Burgess, P.L.L.C.*) and *Anne-Marie E. Sargent* (of *Connor & Chung, P.L.L.C.*), for appellants.

Robert M. McKenna, Attorney General, and *Amanda J. Goss*, Assistant, for respondent.

LEXIS Publishing™ Research References

2005 Wash. App. LEXIS 33

Richard A. Finnigan et al., *Washington Administrative Law Practice Manual*

¶1 Cox, C.J. — Truck drivers who deliver sand, gravel, crushed rock, concrete mix, asphalt, or other similar materials to a public works project site are beneficiaries of Washington’s prevailing wages statute¹ when they “spread[, level[, roll[, or otherwise participate in the incorporation of the [delivered] materials into the project.”² Drivers who do not so participate in the incorporation of materials into the project are not entitled to prevailing wages.³

¶2 Here, the Director of the Department of Labor and Industries (L&I) determined that end-dump truck drivers employed by Silverstreak, Inc., T-Max Construction, Stowe Construction, Gary McCann Trucking, and Buckley Recycling (the Companies) “participated in ‘incorporation’ under WAC 296-127-018(2) of fill material into” a public works

¹ RCW 39.12.010-.900

² WAC 296-127-018(2)(a).

³ WAC 296-127-018(3)(a).

project. Accordingly, the Director concluded that the drivers are entitled to be paid prevailing wages.

¶3 We hold that the record shows that the end-dump truck drivers neither spread, leveled, nor rolled any of the fill material that they delivered to the site. Moreover, they did not “otherwise participate in the incorporation” of fill material at the site. We reverse.

¶4 This prevailing wage case arises from work end-dump truck drivers performed at a public works project. The facts are largely undisputed.

¶5 The project was Phase 1 of the Sea-Tac Third Runway Embankment Project. The objective of Phase 1 was to clear 20 acres of land at Seattle-Tacoma International Airport and to construct a runway embankment with fill material. This required the delivery of approximately 800,000 cubic yards of fill material. There is no dispute that the fill material here was the type specified in the regulation at issue.

¶6 City Transfer, Inc., (CTI) was the prime contractor for the work. It subcontracted with the Companies to supply and deliver fill material for the construction of the embankment.

¶7 Between the last week in May and the second week of December 1998, the Companies delivered fill material to the site using two types of vehicles.⁴ An end-dump truck and trailer (pup) combination was one type.⁵ The other was a belly-dump truck combination.⁶ We describe more fully later in this opinion how the drivers of these vehicles delivered fill material to the site.

⁴ Office of Director of Administrative Hr'gs for the Department of Labor & Industries Proposed Finding of Fact 5 of Director's Order, Administrative R. at 3341-42.

⁵ Office of Director of Administrative Hr'gs for the Department of Labor & Industries Proposed Finding of Fact 5 of Director's Order, Administrative R. at 3342.

⁶ Office of Director of Administrative Hr'gs for the Department of Labor & Industries Proposed Finding of Fact 5 of Director's Order, Administrative R. at 3342.

¶8 The Companies paid the belly-dump truck drivers prevailing wages. But they paid the end-dump truck drivers market wages.

¶9 L&I issued notices of violations to the Companies for failure to pay end-dump truck drivers prevailing wages for work they did at the public works project site. The Companies objected, taking the position that the nature of the work these drivers performed was limited to delivery of materials and did not include participation in any incorporation of the delivered materials into the project.

¶10 Following a hearing, an administrative law judge (ALJ) concluded that the method of delivery of the fill to the project by the end-dump truck drivers did not constitute participation in incorporation of materials into the project.⁷ Following review of the ALJ's proposed findings and conclusions, the Director disagreed.

¶11 The Director concluded that there were two bases under WAC 296-127-018 for the end-dump truck drivers to be paid the prevailing wage. First, the drivers participated in incorporation of the fill by depositing it directly on the embankment rather than stockpiling it at a central location. According to the Director, the drivers worked in conjunction with other workers who were blading and spreading the deposited fill material, thereby incorporating the fill into the site. Second, the Director also found that the end-dump truck drivers drove over fill material in an activity akin to “rolling” within the meaning of the regulation, thus compacting the materials into the site.

¶12 The Companies sought review by the superior court. The court affirmed the Director's decision in part, deciding that the end-dump truck drivers participated in incorporation of the fill material into the public works project. But the court further held that there was insufficient evidence to sustain the Director's finding that the end-dump truck driver's drove over fill material in an activity akin to

⁷ Office of Director of Administrative Hr'gs for the Department of Labor & Industries Proposed Conclusion of Law 6 of Administrative Law Judge, Administrative R. at 3333.

“rolling.” Accordingly, the court held that the end-dump truck drivers are entitled to be paid prevailing wages solely on the basis that they were “otherwise participating in incorporation of the delivered materials” into the project.

¶13 The Companies appeal. L&I did not cross appeal.

PREVAILING WAGES ON PUBLIC WORKS

¶14 The Companies argue that the end-dump truck drivers did not spread, level, roll or otherwise participate in the incorporation of fill materials into the project site and thus are not entitled to prevailing wages. We agree.

[1-4] ¶15 An appeal from a notice of violation under Washington’s prevailing wage statute is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW.⁸ We review the Director’s order, which is the final agency order.⁹ In reviewing the Director’s administrative action, we sit in the same position as the trial court and apply the APA standards directly to the administrative record that was before the agency.¹⁰ We review questions of law de novo, but we accord substantial weight to the agency’s interpretation of the statutes that it administers.¹¹ We review findings of fact for substantial evidence in light of the whole record.¹² On mixed questions of law and fact, we determine the law independently, then apply it to the facts as found by the agency.¹³

⁸ RCW 39.12.065(1).

⁹ RCW 39.12.065(1).

¹⁰ *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

¹¹ *Everett Concrete Prods., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988) (citing *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106 (1983)).

¹² RCW 34.05.570(3)(e).

¹³ *Hamel v. Employment Sec. Dep’t*, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998), review denied, 137 Wn.2d 1036 (1999).

¶16 The prevailing wages on public works act¹⁴ is remedial, and courts construe it liberally to protect the employees of government contractors from substandard earnings and to preserve local wage standards.¹⁵ The employees, not the contractor or its assignee, are the beneficiaries of the act.¹⁶

¶17 WAC 296-127-018 specifies the circumstances under which workers who deliver certain materials to a public works project site are entitled to prevailing wages. It states as follows:

Coverage and exemptions of workers involved in the production and delivery of gravel, concrete, asphalt, or similar materials.

....

(2) All workers, regardless of by whom employed, are subject to the provisions of chapter 39.12 RCW when:

(a) They deliver . . . materials to a public works project site and perform any spreading, leveling, rolling, or otherwise participate in any incorporation of the materials into the project;

....

(3) Workers are *not* subject to the provisions of chapter 39.12 RCW when:

(a) The employees’ duties do not include spreading, leveling, rolling, or otherwise participating in the incorporation of the delivered materials into a public works project, . . .¹⁷

¶18 Examination of the plain words of the regulation makes clear that a worker’s mere delivery of materials to the site, without more, is insufficient to trigger the duty to pay prevailing wages. The use of the conjunction “and” to

¹⁴ RCW 39.12.020 states:

The hourly wages to be paid to laborers, workers, or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality within the state where such labor is performed.

¹⁵ *Everett Concrete*, 109 Wn.2d at 823.

¹⁶ *Everett Concrete*, 109 Wn.2d at 823.

¹⁷ WAC 296-127-018 (emphasis added).

